STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES JALON DUKES,

Defendant-Appellant.

UNPUBLISHED
September 15, 2005

No. 255820
Genesee Circuit Court
LC No. 03-012866-FC

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.224b, and carrying a concealed weapon, MCL 750.227. We affirm.

I. FACTS

Crystal Daniels testified that defendant came to her house on June 2, 2003 and asked whether she and her children wanted to ride in his car, a Blazer. She and her children were in the Blazer when it ended up on Baltimore Street. Daniels testified that while they were driving around, defendant saw Telan Boyd getting into a white car. Defendant then had the driver follow the white car Boyd was in around the block. Both cars stopped and Boyd came over to the Blazer and started talking to her.

Daniels testified that while she was talking to Boyd, defendant jumped out of the Blazer and asked Boyd if he had "it." Boyd stated that he did not and "I let you hold my dope and I'm gonna let you see how it feel [sic]." Defendant was close to Boyd at this point and Boyd pushed defendant back. Defendant then jumped back into the Blazer, grabbed a gun, jumped back out of the Blazer, and pointed the gun at Boyd. Boyd began to walk away from the situation, but then he turned around and asked defendant if he was going to shoot him. When Boyd turned around the gun was in his face. Boyd grabbed defendant's hand that was holding the gun. Daniels testified that she then put her children's heads and her head down but she heard six shots fired.

When Daniels looked up, she saw Boyd hitting defendant in the head and then Boyd grabbed his stomach and fell to the ground. Defendant got back into the Blazer and said that he had been shot in his left arm. Daniels testified that the Blazer drove away from the scene rapidly

and defendant told her that he shot Boyd four times in the chest. Daniels testified that they switched cars and defendant's uncle or cousin and her took defendant to the hospital.

Dr. Douglas Congdon testified that he performed the autopsy on Boyd. Dr. Congdon testified that Boyd had three gunshot wounds; an entrance wound in his right abdominal area, an entrance wound in his right thigh, and an exit wound on the back of his right thigh. Boyd bled to death from the gunshot wound to his abdomen. There were no findings that Boyd was shot at close range, where the gun was pressed into the skin, but the gun may have been as close as an inch or two away.

II. STIPULATION

Defendant first argues that the trial court abused its discretion by allowing the prosecutor to inform the jury of the specific offense that he was previously convicted of for purposes of the felon in possession of a firearm charge, despite his offer to stipulate that he had been previously convicted of a specified felony that made him ineligible to possess a firearm. We disagree.

A. Standard of Review

We review a trial court's exclusion or admission of evidence for an abuse of discretion. *People v Akins*, 259 Mich App 545, 559; 675 NW2d 863 (2003).

B. Analysis

Defendant offered to stipulate that he had been convicted of a specified felony for the purpose of the felon in possession of a firearm charge. The prosecutor did not agree to the stipulation and requested that the jury be informed of the particular crime that was the basis of the felon in possession of a firearm change. The trial court allowed the prosecution to proceed.

In *People v Swint*, 225 Mich App 353, 379; 572 NW2d 666 (1997), this Court found, based on *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997), that a trial court abused its discretion by refusing to accept a defendant's stipulation that he had been convicted of a specific felony and was ineligible to possess a firearm. The Court stated:

> "In dealing with the specific problem raised by [18 USC] 922(g)(1) [the federal felon-in-possession statute] and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, for the reasons already given, but will be substantial whenever the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious . . . ." [*Swint, supra*, 225 Mich App 378, quoting *.Old Chief, supra,* 519 US 185.]

Here, the prior conviction was for a drug crime, while the current case involved weapons charges and a second-degree murder charge. Thus, the prior crime is not one similar to the charges in the present case. Therefore, the risk that the jury would be lured into a sequence of bad character

reasoning is small. Defendant was not prejudiced by the introduction of the specific nature of his prior conviction and the trial court did not abuse its discretion in allowing its introduction.

III. PROSECUTORIAL CONDUCT

Defendant next argues that the prosecutor committed misconduct when, in opening statements, he referred to defendant as a fourth offense habitual offender. We conclude defendant is not entitled to relief in this regard.

A. Standard of Review

We review claims of prosecutorial misconduct de novo as they are constitutional issues. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The prosecutor's remarks are reviewed in context to determine whether they denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). A trial court's reminder that a party's arguments are not evidence is generally sufficient to overcome any prejudice from improper remarks. *Id*. at 281.

B. Analysis

In this case, the prosecutor only made one reference to defendant as a habitual fourth offender at the beginning of trial and the trial court instructed the jury both at the beginning and end of trial that the attorney's statements were not evidence. Therefore, defendant was not denied a fair trial by the prosecutor's isolated remark.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant finally argues that he was denied effective assistance of counsel when his trial attorney failed to request that the jury be instructed on the defense of accident. We disagree.

A. Standard of Review

Here, there was no *Ginther*[1] hearing held in the trial court; thus, this Court's review is limited to mistakes that are apparent from the lower court record. *People v Riley* (*After Remand*), 468 Mich 135, 139; 659 NW2d 611 (2003).

B. Analysis

In order to show ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant bears the heavy burden of showing that counsel was not effective, as effectiveness of counsel is presumed. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

761 (2004). Defendant must also overcome a strong presumption that counsel's decisions did not constitute sound trial strategy. *Riley*, *supra* at 140. Additionally, "[i]neffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *Id*. at 142. The relevant "inquiry is not whether a defendant's case might conceivably have been advanced by alternate means," but if the defendant's counsel's errors were so great that they deprived the defendant of a fair trial. *LeBlanc*, *supra* at 582.

Defendant argues that trial counsel was ineffective for not requesting an accident instruction. But trial counsel reasonably pursued a defense of self-defense, which was supported by evidence and on which the jury was instructed. Although a defendant may present inconsistent defenses, defendant has not overcome the presumption that only presenting a defense theory of self-defense was not trial strategy. *Riley*, *supra* at 140. Based on the evidence presented at trial, self-defense was a more plausible defense than accident. As such, it was within defense counsel's sound trial strategy to present the jury with self-defense alone as the defense to the crime. Therefore, we conclude that defendant received effective assistance of counsel.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette